Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-139

DUDLEY MORGAN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Dudley Morgan, Jr., prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on April 18, 1977 (and thereby, in effect, to review the conviction and sentence imposed by the United States District Court for the Southern District of New York on October 8, 1976).

OPINION BELOW

The decision of the Second Circuit, as yet unreported, appears at Appendix A. The Conviction and sentence imposed by the United States District Court for the Southern District of New York is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 18, 1977.[1] Petitioner filed a Petition for Rehearing in Banc which was denied on June 29, 1977.[2] This petition for certiorari was filed less than thirty days from the date of the denial of the Petition for Rehearing in Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The United States of America prosecuted Petitioner for mail fraud and the use of schemes and artifices to defraud in connection with the sale of securities in inter-state commerce. At the trial, Petitioner introduced testimony to establish his good character, and the questions arising as a result of the cross-examination of Petitioner's character witnesses are:

1. Whether questions asked by a United States Attorney over Defendant's objection to character

1. Appendix A.
2. Appendix B.

witnesses of the Defendant, and which assume Defendant's guilt of the offense for which he is on trial, violate Defendant's right to the presumption of innocence, to a fair trial, and to due process under the due process clause of the Fifth Amendment.

2. Whether the asking of questions to Defendant's character witnesses which assume a Defendant's guilt of the offense for which he is on trial constitutes a serious denial of Defendant's constitutional rights, or merely constitutes "harmless error."

3. Whether Rule 405 of the Federal Rules of Evidence permits a United States Attorney to ask Defendant's character witnesses questions on cross-examination which assume that the Defendant is guilty of the alleged offense for which he is being tried.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

FEDERAL RULES INVOLVED

Rule 405 of the Federal Rules of Evidence:

"(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person

is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

STATEMENT OF CASE

The facts relevant to the questions presented by this Petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

Petitioner, Dudley Morgan, Jr., was the managing partner of a brokerage firm in Tulsa, Oklahoma. He was charged with failing to disclose certain material facts in connection with the sale of stock of a New York corporation named Display Sciences, Inc. The indictment alleged, *inter alia*, that Petitioner had sold stock in Display Sceinces, Inc. when he knew the corporation was in receivership, and that he failed to disclose to the purchasers that the corporation was in receivership.

The principal Government witness was one Frank Dell'Aglio, a co-defendant who had previously received probation as a result of a plea-bargaining agreement. Both Dell'Aglio and Erwin Pincus, an attorney, testified

that Petitioner knew the corporation was in receivership at the time he sold the stock.

Petitioner testified in his defense that he had not known that the corporation was in receivership during the period in question. He testified that, if he had been aware of the receivership or other negative information concerning the corporation, he and his family would not have invested over One Hundred Thousand Dollars ($100,000.00) in the corporation during the period in question. The critical issue therefore became one of credibility between Dell'Aglio and Pincus, on the one hand, and Petitioner on the other. Petitioner called numerous character witnesses who testified as to Petitioner's good character, and the questions presented herein involve the cross-examination of the character witnesses by the United States Attorney.

Over Petitioner's objection, the Government asked three of Petitioner's character witnesses who had presented favorable character evidence on Petitioner's behalf, if their opinion would change if they knew that Petitioner had committed various acts alleged in the indictment.[3] In other words, the Government's question was, in effect, "would your opinion about Petitioner

3. Specifically, the prosecutor asked, "Now, Mr. (witness), if Mr. Morgan knew that Display Sciences, was in receivership at the time he was selling these shares of Display Sciences stock between May and July of 1972 and didn't tell that to his customers, would your opinion of him change at all?" Trial Transcript, p. 55A.

change if you knew that he was guilty of this charge for which he is being tried?" Each of the character witnesses who was asked this question stated that his opinion *would* change under those circumstances.

Petitioner was convicted by the jury, but the trial court acknowledged in the record that the question as to his guilt or innocence was a close one.[4] After he was convicted by the jury, Petitioner was sentenced on the 8th day of October, 1976 to a term of two years in the custody of the Attorney General, on the condition that he be confined in a jail-type or treatment institution for two months and that he serve the balance of the two years on probation.

An appeal was taken by Petitioner to the United States Court of Appeals for the Second Circuit, and on April 18, 1977, that Court affirmed the judgment below. Petitioner timely filed a Petition for Rehearing in Banc, which was denied on June 29, 1977.

The Second Circuit recognized in the majority opinion that the questions which were asked by the United States Attorney should not have been asked and that the probative value of such questions were negligible.[5] The concurring opinion of Circuit Judge

4. Judge Wyatt stated at sentencing:
"And if I were free to decide everything on the basis of my personal feelings, you would probably walk out a free man." Trial Transcript, p. 105A.
5. Appendix A, Page A6.

Mansfield went further, stating that the questions "were improper because they asked the jury to assume the Defendant to be guilty of the very charge on trial . . . ."[6] Nevertheless, the majority found that the admission of the questions was within the discretion of the trial court,[7] while the concurring opinion concluded that, since no "prejudice" had been shown, the error of allowing the questions to be asked was "harmless".[8]

After the affirmance by the Second Circuit, this Petition for a Writ of Certiorari issued.

REASONS FOR THE ALLOWANCE OF THE WRIT

This case involves the flagrant denial by a United States Attorney and the trial court of Petitioner's fundamental right to the presumption of innocence. Incredibly, the Second Circuit has put its tacit stamp of approval upon questions addressed to character witnesses, when substantially identical questions have for decades in the vast majority of state and federal jurisdictions been held to violate a defendant's right to be presumed innocent.[9] The Second Circuit opinion not only conflicts with the Fifth Circuit opinion in *United States v. Candelaria-*

6. Appendix A, page A7.
7. Appendix A, page A6.
8. Appendix A, page A7.
9. *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977); *Sexton v. State*, 312 So.2d 71 (Ala. 1975); *Craft v. Mississippi*, 181 So.2d 140 (Miss. 1965); *Diggs v. State*, 88 S.W.2d 103 (Tex. 1935); *Gaugh v. Commonwealth*, 87 S.W.2d 94 (Ky. 1935).

Gonzalez, 547 F.2d 291 (5th Cir. 1977) and with this Court's discussion concerning the presumption of innocence in *Estelle v. Willaims*, _____ U.S. _____, 96 S. Ct. 1691 (1976), but it also conflicts with the basic notion of a fair trial and with the rule that the filing of an indictment cannot, in itself, be used to deny or dilute the defendant's right to be presumed innocent.

I.
THE DECISION BELOW DIRECTLY CONFLICTS WITH THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. CANDELARIA-GONZALEZ, 547 F.2D 291 (5TH CIR. 1977).

As a result of the decision of the Second Circuit there now exists a square and embarrassing conflict between the Second Circuit, which considers the questions asked by the Government as being properly admitted within the discretion of the trial court, and the Fifth Circuit, which considers approval of the questions by the trial court to be an abuse of discretion and prejudicial error which denies the defendant his constitutional rights. *United States v. Candelaria-Gonzalez, supra.* The majority opinion of the Second Circuit attempts to distinguish *Candelaria- Gonzalez* by stating that in *Candelaria-Gonzalez* the questions to character witnesses deal with witnesses who testified concerning the defendant's reputation in the community, whereas in the

present case, the questioning concerned the character witnesses' own opinions about Petitioner's character traits. Petitioner submits that the purported "distinction" is not meaningful and does nothing to ease the clear conflict which now exists between the Circuits.

It is true that the character witnesses in *Candelaria-Gonzalez* appear to have testified concerning the defendant's reputation in the community, while the character witnesses in this case testified as to their *opinions* concerning Petitioner's character. The Second Circuit's opinion, however gives no reason whatsoever to explain why this difference between the two cases should lead to a different result. The Second Circuit's opinion indicates that more liberal cross-examination is permissible when a witness states his own opinion, especially if he is an expert witness. This has no relevance to the case at bar, in which none of the character witnesses were expert witnesses, and the analysis by the Second Circuit begs the question of whether more "liberal" cross-examination can be allowed to deprive a defendant of his right to the presumption of innocence and due process of law. The Second Circuit also appears to rely upon Rule 405 of the Federal Rules of Evidence, but certainly Rule 405 was not intended to abrogate the presumption of innocence or to permit questions to be asked which rest upon an assumption of guilt!

Besides, it has been recognized by the draftsmen of Rule 405 that a character witness's testimony concerning a defendant's reputation in a community always has, in fact, been that witness's *opinion* of the defendant's reputation in the community, and has therefore been opinion evidence "in disguise". Thus the purported distinction between "reputation" testimony and "opinion" testimony is shown to be meaningless by the draftsmen of the Federal Rules of Evidence.[10]

The language of the Fifth Circuit in *Candelaria-Gonzalez* is, in any event, clear and unambiguous, leaving no room for a facile distinction between "reputation" testimony and "opinion" testimony.

II.
THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS HONORABLE COURT'S STATEMENTS AS SET FORTH IN ESTELLE V. WILLIAMS _____ U.S. _____, 96 S. CT. 1691 (1976).

This Court has always emphasized the importance of the presumption of innocence in a criminal trial. In *Coffin v. United States*, 156 U.S. 432 (1895) this Court said:

> "The principal that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, *and its enforcement lies at the foundation of the administration of our criminal law.*" (Emphasis supplied.) 156 U.S. at 453.

10. Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A., Federal Rules of Evidence, Rule 405, p. 148.

In *Estelle v. Williams, supra*, this court held that a defendant who fails to object to being tried in prison clothes, and who cannot present sufficient reason for failure to raise the issue before trial, cannot complain that his right to be presumed innocent was violated. Mr. Chief Justice Burger, after pointing out that the presumption of innocence constitutes a basic component of a fair trial, went on to say:

> "[T]o implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt (citation ommitted). The actual impact of a particular practice on the judgment of jurors cannot always be fully determined, but this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." (Citation omitted.) 96 Sup. Ct. at 1693.

In this case, the Second Circuit, while recognizing that the prosecutor's questions assuming Petitioner's guilt should not have been asked, totally ignored the teaching of *Estelle*, and stated that the trial court could allow the questioning in the exercise of its discretion.

The concurring opinion, recognizing that the questions asked the jury to assume Petitioner's guilt, said that the questioning constituted "harmless error" because Petitioner did not "show prejudice." *Estelle* does point out that some procedures which are contrary to the presumption of innocence may constitute harmless error in some cases. Obviously, for example, if a man is being tried for escape from the penitentiary, it cannot be too prejudicial if he is tried in prison clothes! The fatal flaw in the Second Circuit's decision is that it put the burden on *Petitioner* to prove prejudice. This is directly contrary to the holding in *Chapman v. California*, 386 U.S. 18 (1967), in which this Court stated:

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The burden is not on Petitioner to show prejudice but upon the Government to prove beyond a reasonable doubt that no prejudice resulted from the denial of Petitioner's fundamental rights to a fair trial and the presumption of innocence.

Here there was no waiver as in *Estelle* and certainly no showing of "harmless error". The nature of the error here is quite different from that considered by this Court in *Estelle*. When a defendant goes to trial in jail clothes, neither witness nor jury is expressly asked to assume that the defendant is guilty. In this case, however, the

witnesses and the jury *were* asked to assume Petitioner's guilt. Petitioner submits that the severe prejudice resulting from the prosecutor asking the jury to assume the Petitioner's guilt (as admitted in the concurring opinion) cannot constitute "harmless error." In allowing the questions to be asked, the trial court abused its discretion and denied Petitioner his right to be presumed innocent and to a fair trial.

III.
THE DECISION BELOW SETS FORTH AN INTERPRETATION OF RULE 405 OF THE FEDERAL RULES OF EVIDENCE WHICH SHOULD BE CORRECTED.

As indicated above, the Second Circuit's decision holds that Rule 405 somehow justifies the trial court's decision in this case upon the grounds that the "liberal" cross-examination envisioned by the Rule, entitles the Government to ask questions of a defendant's non-expert character witnesses which assume a defendant's guilt. The Second Circuit's decision, if allowed to stand, will lead to confusion as to the scope of Rule 405 and will have a deleterious effect upon the administration of justice in the Federal Courts. This Honorable Court, which has an interest in the uniform administration of justice in the Federal Courts and in the correct interpretation of the Federal Rules of Evidence, should therefore act to correct this anomalous decision.

* * *

WHEREFORE, Petitioner prays that a Writ of Certiorari issue.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Second Circuit

No 801 — September Term, 1976
(Argued February 25, 1977 Decided April 18, 1977.)
Docket No. 76-1497

UNITED STATES OF AMERICA,
Appellee,

vs.

DUDLEY D. MORGAN, JR.,
Defendant-Appellant.

Before:
Mansfield and Van Graafeiland, Circuit Judges,
and Mishler, District Judge,*

Appeal from a judgment convicting defendant of violations of 18 U.S.C. §1341 and 15 U.S.C. §§77q (a) and 78j (b) after a jury trial in the United States District Court for the Southern District of New York, Wyatt, J.

Affirmed.

JAMES C. LANG, Tulsa, Oklahoma (Sneed, Lang, Trotter & Adams, Tulsa, Oklahoma, of Counsel), for Defendant-Appellant.

* Chief Judge, Eastern District of New York, sitting by designation.

ALAN M. GOLDSTON, Special Attorney, U.S. Department of Justice (Robert B. Fiske, Jr., U.S. Attorney for the Southern District of New York; Audrey Strauss, Assistant U.S. Attorney, of Counsel), for Appellee.

VAN GRAAFEILAND, Circuit Judge:

After a jury trial in the United States District Court for the Southern District of New York, appellant was convicted on eleven counts of mail fraud, 18 U.S.C. §1341, and on two counts of engaging in fraudulent, deceptive and manipulative securities transactions, 15 U.S.C. §§77q (a) and 78j(b). We affirm.

Appellant was the managing partner of a brokerage firm in Tulsa, Oklahoma, and the corporation whose stock he was charged with mishandling was Display Sciences, Inc. Display was incorporated in New York in 1968 and went public in 1970. It was engaged in the design and manufacture of large-screen television projection equipment but found this to be financially unrewarding and was forced into receivership in 1971. The Government's proof established that appellant, who had invested heavily in the corporation, sold a quantity of the company's stock which was unregistered without disclosing the lack of registration and without disclosing the fact that the company was in receivership. In addition, misstatements were made concerning the number of shares outstanding and the status of negotiations between Display and the State of Connecticut for a contract covering off-track betting installations.

Appellant's defense, based on asserted lack of knowledge and good faith, was rejected by the jury; and appellant does not seriously contend that the facts were insufficient to warrant this determination. His appeal is

based instead upon several evidentiary rulings which he contends were prejudicially erroneous.

The first of these arises out of a telephone conversation between the defendant and Frank Dell'Aglio, the founder of Display Sciences, Inc. and Chairman of its Board, who was called as a government witness. Dell'Aglio testified that, during a telephone conversation with defendant concerning Display's deteriorating financial condition, defendant was very angry. When admonished by the court to state what defendant had said, rather than advancing his own opinion or conclusion concerning defendant's state of mind, the witness quoted defendant as having said:

> [Y]ou know you have a Mafia up there, we have an Oklahoma Mafia here.

Appellant contends that the court's refusal to strike this testimony was reversible error. We disagree. The subject was not pursued, and it is far from clear what an "Oklahoma Mafia" is. Moreover, no attempt was made to establish any connection between the defendant and this organization, if such it was. In fact, on summation, the prosecutor described defendant's remark as merely another example of his "puffing and misstatements". We find no ground for reversal here. See United States v. Schwartz, Dkt. No. 76-1324, (2d Cir. Jan. 25, 1977), slip opin. 1535, 1542-44; United States v. Polizzi, 500 F.2d 856, 888 n.54 (9th Cir. 1974), cert denied, 419 U.S. 1120 (1975).

The second ruling complained of occurred during the Government's cross-examination of one of defendant's character witnesses. After this witness had testified concerning appellant's reputation for honesty, integrity and truthfulness and had stated his own favorable opinion as to these character traits, he was asked if his opinion would change if appellant knew that Display was

in receivership and didn't disclose that fact to his customers. Appellant contends that this question was prejudicially improper, because it was not confined to the time period prior to the incidents for which he was being tried and because it forced the witness and invited the jury to assume that he was guilty.

Appellant's "time period" argument can be quickly disposed of. When a witness, as here, testifies concerning the defendant's then existing traits of honesty and veracity, cross-examination may include acts up to the time the witness testifies. United States v. Kelner, 534 F.2d 1020, 1028 (2d Cir.), cert. denied, 45 U.S.L.W. 3431 (Dec 14, 1976); United States v. Lewis, 482 F.2d 632, 640 n.44 (D.C.Cir. 1973).

Appellant's able counsel has cited a number of cases from state courts which hold that hypothetical questions of the general nature of the one asked by the Government herein are prejudicially improper. However, in each of these the subject under discussion was the reputation of the defendant in the community.[1] Here, the matter being pursued was the opinion of the witness concerning the defendant's character. When a witness is permitted to state his own opinion on a matter in issue, as he is now under Rule 405 of the Federal Rules of Evidence, some latitude in cross-examination must be allowed.[2]

1. Prior to the enactment of the Federal Rules of Evidence, a so-called "character witness" was not permitted to give his own opinion of the defendant's character but was limited to testimony concerning his reputation. Michelson v. United States, 335 U.S. 469, 477 (1948). Rule 405 of the Federal Rules provides in part that in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony in the form of an opinion. Counsel cannot, therefore, always rely upon decisions applying the "archaic" and "paradoxical" law, Michelson, supra, at 486, which preceded the Rules.
2. United States v. Candelaria-Gonzales, 20 Crim.L.Rep. 258 (5th Cir. Feb. 18, 1977) is not to the contrary because it deals with a witness who testified concerning defendant's reputation in the community.

Opinion testimony of expert witnesses has traditionally been given in response to hypothetical questions based upon the evidence in the case, United States v. White, 124 F.2d 181, 185-186 (2d Cir. 1941), and this form of questioning may properly be used on cross-examination as well as direct. Stahl v. United States, 144 F.2d 909, 913 (8th Cir. 1944).

The argument has long since been laid to rest that, where an expert expresses an opinion on an assumed state of facts, he is usurping the province of the jury. Guzik v. United States, 54 F.2d 618, 619-20 (7th Cir. 1931), cert. denied, 285 U.S. 545 (1932); Tinkoff v. United States, 86 F.2d 868, 879-80 (7th Cir. 1936), cert. denied, 301 U.S. 689 (1937); Myres v. United States, 174, F.2d 329, 336 (8th Cir.), cert. denied, 338 U.S. 849 (1949); Fed. Rules Evid. Rule 704. Wigmore calls this agrument a "bugbear", and a "mere bit of empty rhetoric" which "has done much to befog bench and bar." Wigmore on Evidence §§673, 1920 (1940). As pointed out by the court in Guzik, supra, the jury still has to determine the controverted issue of whether the assumption which the witness has made is correct. Time and again, experts are asked hypothetical questions which assume the very facts upon which the defendant's guilt is predicated. If the question is based upon the evidence, it may be permitted in the exercise of the trial judge's discretion. Heller v. United States, 104 F.2d 446, 449 (4th Cir. 1939). Indeed, in technical cases such as those involving tax fraud, it is difficult to visualize how the Government could prove its case in any other manner. See United States v. Caserta, 199 F.2d 905, 908 (3d Cir. 1952). "So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not to be too finicky or fearful in allowing some discretion to trial

judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules." United States v. Johnson, 319 U.S. 503, 519-20 (1943).

We conclude, therefore, that the asking of the hypothetical question at issue herein, based as it was upon testimony already offered, was not prejudiciously improper so as to mandate reversal. It introduced nothing into the case which was not already before the jury. In rulings on character evidence, the District Court has wide discretion and will be reversed only upon a clear showing of prejucicial abuse. United States v. Dibrizzi, 393 F.2d 642, 645 (2d Cir. 1968). We find no such showing in this case. Cf. United States v. Null, 415 F.2d 1178, 1179-80 (4th Cir. 1969).

It does not follow from this holding that we approve of the question which was asked. Because it is too early in the history of Rule 405 to predict how much use ingenious counsel will make of opinion testimony from witnesses who may qualify as experts on traits of character, we are reluctant to prescribe an evidentiary rule which will inhibit full cross-examination of any such expert. Insofar as non-expert character witnesses are concerned, however, we believe that the probative value of a hypothetical question such as the one at issue herein is negligible and that it should not be asked. The jury is in as good a position as the non-expert witness to draw proper inferences concerning the defendant's character from its own resolution of the issue. Cf. Wigmore, supra, at §679.

Finally, appellant contends that the District Court erred in refusing to admit testimony concerning possible representations made to other witnesses by officers of Display Sciences, Inc. Relevancy of proffered evidence is a matter largely within the discretion of the trial court, Hamling v. United States, 418 U.S 87, 124-25 (1974);

United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976). There was no abuse of the court's discretion in this case. See Muschany v. United States, 324 U.S. 49, 58 (1945).

The judgment appealed from is affirmed.

MANSFIELD, Circuit Judge (concurring):

I concur in Judge Van Graafeiland's well-reasoned opinion. In addition, I believe that the questions put by the prosecutor to the character witnesses were improper because they asked the jury to assume the defendant to be guilty of the very charge on trial, i.e., that he sold stock to his customers without disclosing that the company was in receivership. Since character eivdence is admitted only as bearing upon guilt or innocence, an opinion based upon the assumption that the defendant is guilty cannot have any probative value in deciding that issue. However, in the absence of any showing of prejudice, the error was harmless in the present case.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

As a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-seven.

United States of America,
Plaintiff-Appellee,

v.

Victor Danenza, Frank Dell'Aglio, K. Cyrus Melikian, Michael Brodsky, Dudley Morgan, Triple Management Inc.,
Defendants

Dudley Morgan,
Defendant-Appellant.

76-1497

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Dudley Morgan, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman

IRVING R. KAUFMAN,
Chief Judge

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

No. 77-139

In the Supreme Court of the United States

OCTOBER TERM, 1977

DUDLEY D. MORGAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-139

DUDLEY D. MORGAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 554 F. 2d 31.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1977. A petition for rehearing was denied on June 29, 1977 (Pet. App. A8). The petition for a writ of certiorari was filed on July 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was improperly prejudiced by questioning that elicited that defense character witnesses would have had a different opinion of petitioner's integrity if he had engaged in securities fraud.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of 11 counts of mail fraud and of two counts of engaging in fraudulent, deceptive, and manipulative securities transactions, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a) and 78j(b). He was sentenced to two years' imprisonment, 22 months of which were suspended.

The facts are set out in the opinion of the court of appeals (Pet. App. A2-A3). Petitioner was the managing partner of a securities brokerage firm in Tulsa, Oklahoma. Between May and July of 1972 he sold a quantity of stock in Display Sciences, Inc., a New York corporation engaged in the design and manufacture of large screen television projection equipment, without disclosing the fact that the stock was unregistered or that the company was in receivership. Petitioner also misstated the number of shares outstanding and the status of negotiations between the company and the State of Connecticut for a contract covering off-track betting installations.

Petitioner contended that he had relied upon misinformation supplied to him by the management of Display Sciences and had passed on this information to his customers and salesmen, unaware that it was materially incomplete or false. Petitioner produced five witnesses who testified favorably concerning petitioner's reputation for honesty, integrity and truthfulness and their own opinions about petitioner's possession of these character traits.

On cross-examination of three of these witnesses, the prosecutor asked the following hypothetical question designed to probe the witness's opinion: "[I]f [petitioner]

knew that Display Sciences was in receivership at the time he was selling these shares of Display Sciences stock between May and July 1972 and didn't tell that to his customers, would your opinion of him change at all?" (Tr. 763, 854, 869). Each witness stated that on this assumption his favorable opinion of petitioner would change (*ibid.*).

The court of appeals acknowledged (Pet. App. A4) that a number of cases had held such hypothetical questions to be improper. The court of appeals joined these other courts, holding that "the probative value of a hypothetical question such as the one at issue herein is negligible and * * * it should not be asked" (*id.* at A6). It affirmed petitioner's conviction, however, because the hypothetical question "introduced nothing into the case which was not already before the jury" (*ibid.*) and consequently did not prejudice petitioner.

ARGUMENT

Petitioner contends that it was improper for the district court to allow the prosecutor to ask his character witnesses a hypothetical question that assumed that petitioner committed the crime with which he was charged. He contends that the question deprived him of his presumption of innocence.

The court of appeals disapproved the question that was asked (Pet. App. A6). This case therefore does not present any conflict among the circuits concerning the propriety of such a question. The court of appeals held only that the hypothetical question did not prejudice petitioner, because it did not place before the jury any arguments or evidence that were not already there. That essentially factual decision is correct, and there is no need for this Court to review it.

In any event, petitioner's argument that hypothetical questions such as the one at issue here invariably undermine the presumption of innocence does not bear scrutiny. The district court has substantial discretion in controlling the scope of cross-examination of a character witness. *Michelson* v. *United States*, 335 U.S. 469, 480; *United States* v. *Madrid Ramirez*, 535 F. 2d 125, 128-129 (C.A. 1); *United States* v. *Lewis*, 482 F. 2d 632, 642 (C.A.D.C.). The hypothetical question in this case was based solely upon evidence that was already before the jury. This reference to already-introduced evidence did not affect the presumption of innocence. The district court carefully instructed the jury on the presumption of innocence and the government's burden of proving petitioner's guilt beyond a reasonable doubt (Tr. 1103-1104). The court also told the jury that character evidence alone could establish a reasonable doubt (Tr. 1140); this instruction was more favorable to petitioner than the law requires where, as here, the defense did not rest solely on character evidence. See *Oertle* v. *United States*, 370 F. 2d 719, 727 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Minieri*, 303 F. 2d 550, 555 (C.A. 2).

The decision below does not conflict with the Fifth Circuit's ruling in *United States* v. *Candelaria-Gonzalez*, 547 F. 2d 291. As we have pointed out, the court below, like the court in *Candelaria-Gonzalez*, disapproved the hypothetical question. The cases also are distinguishable. *Candelaria-Gonzalez* held that it was error to ask, on cross-examination of a character witness who had testified concerning the defendant's general reputation *in the community*, whether that general reputation would be affected if the defendant were convicted of the crime with which he was charged. Here, by contrast, petitioner's character witnesses testified not

only concerning petitioner's general reputation in the community but also concerning their personal opinions. When a character witness states his own opinion of a defendant's character, as he is now permitted to do under Fed. R. Evid. 405(a), "some latitude in cross-examination must be allowed" to explore the basis of that opinion (Pet. App. A4). The witness could discuss his own reactions to hypothetical facts. But if, as in *Candelaria-Gonzalez*, a witness testifies only concerning what he has heard about a defendant's reputation in the community, he may not properly discuss the community reaction to a conviction; the character witness in such a case "had heard nothing in the community about [the defendant's] post conviction reputation when he had been convicted of nothing whatsoever. No one yet knew what people would say about him if he were convicted" (547 F. 2d at 294).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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